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December 5, 2018

VIA E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Superintendent of Securities, Nunavut

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RE: Request for Comment on Proposed National Instrument 52-112, Proposed Companion Policy 52-112 and Related Proposed Consequential Amendments or Changes

This letter is submitted in response to the Notice and Request for Comment dated September 6, 2018 by the Canadian Securities Administrators (the "**CSA**") on proposed National Instrument 52-112 – *Non-GAAP and Other Financial Measures Disclosure* (the "**Proposed Instrument**"), the proposed Companion Policy 52-112 – *Non-GAAP and Other Financial Measures Disclosure* (the "**Proposed Companion Policy**") and the related proposed consequential amendments or changes to various other instruments and companion polices of the CSA.

We have first provided general comments for your consideration, followed by comments that are responsive to certain of the specific questions set out in the Notice and Request for Comment (with the relevant questions reproduced for ease of reference). These comments are those of the writers noted below and do not necessarily reflect the views of clients or others in our firm.

GENERAL COMMENTS

Scope

Application to Issuers vs. Reporting Issuers

It appears that the Proposed Instrument would apply to all "issuers" (not just reporting issuers under Canadian securities laws), other than SEC foreign issuers, who disclose non-GAAP financial measures, segment measures, capital management measures or supplementary financial measures (the "**Covered Financial Measures**") in a document that is intended to be, or is reasonably likely to be, made available to the public in the local jurisdiction (i.e., a Canadian jurisdiction), subject to certain, narrow exceptions. The term "issuer", as defined in Canadian securities law, is very broad – in Ontario, it is defined as "a person or company who has outstanding, issues or proposes to issue a security". If it is indeed the CSA's intention that the Proposed Instrument apply to issuers who are not reporting issuers in Canada, it seems that the Proposed Instrument may apply to a broad range of issuers including:

- Canadian issuers that are not reporting issuers, that have issued debt securities in private placements and that may disclose non-GAAP financial measures or other Covered Financial Measures on their websites or in annual reports or other reports to bondholders or other stakeholders (for example, utility companies such as Ontario local hydro distribution companies);

- Public-Private Partnerships that have issued bonds in private placements to institutional investors and may disclose non-GAAP financial measures or other Covered Financial Measures to their bondholders;

- Possibly, municipalities or other government agencies (at least, those that are organized as corporations of some kind) that have issued debt securities;

- U.S. issuers or funds (whether public in the U.S. or not) who are not "reporting issuers" in Canada, who may issue securities to Canadian investors on a private placement basis, and disclose non-GAAP financial measures or other Covered Financial Measures either in an offering memorandum (usually based on a U.S. disclosure document) relating to the initial investment, on a website or to their investor base generally; and

- Other foreign issuers or funds who may issue securities to Canadian investors on a private placement basis, and disclose Covered Financial Measures either in an offering memorandum (likely based on a foreign disclosure document) relating to the initial investment, on a website or to their investor base generally.

With regard to U.S. issuers, in particular, we note that the exemption for SEC foreign issuers would not apply to a U.S. issuer unless the issuer is a reporting issuer in Canada, since being a "foreign reporting

issuer" is an element of the definition of "SEC foreign issuer" under National Instrument 71-102 – *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* ("**NI 71-102**").

In our view the scope of application of the Proposed Instrument is overly broad and could result in unintended consequences, in particular for Canadian private placement markets, and uncertainty as to application. For example:

- Whether or how the Proposed Instrument is intended apply to municipalities or other government agencies, and financial disclosures they may make, is not entirely clear.

- Would the Proposed Instrument apply to a U.S. issuer that is not a reporting issuer in Canada, and has not issued securities in a primary distribution to Canadians, but that may have Canadian securityholders that purchased those securities over a U.S. exchange, if it discloses Covered Financial Measures on its website or in filings with the U.S. Securities and Exchange Commission?

- We submit that the Proposed Instrument should not apply to U.S. issuers that are U.S. SEC registrants, but not reporting issuers in Canada, and that are parent issuers or credit supporters under Part 13 of National Instrument 51-102 – *Continuous Disclosure Obligations*. The financial disclosure obligations of such issuers are essentially governed entirely by U.S. securities law rules and that should remain the case.

- The regulatory objective, if there is one, of applying the Proposed Instrument to non-reporting issuers, who are generally not otherwise subject to Canadian financial statement or management's discussion and analysis ("**MD&A**") disclosure rules, is not clear to us. There are currently no rules relating to disclosure of financial information generally, in an offering memorandum used by an issuer for a private placement in Canada in reliance on the accredited investor exemption, minimum amount exemption and certain other exemptions from the prospectus requirement. There are also no ongoing financial disclosure requirements under securities laws for non-reporting issuers who have privately placed securities in Canada in this manner. If non-reporting issuers (whether Canadian, U.S. or other foreign issuers) who issue securities on a private placement basis in reliance on such exemptions are not subject to Canadian securities laws relating to historical financial statement disclosure or continuous disclosure, either at the time they issue the securities or thereafter, it is not clear to us why they should become subject to rules regarding their disclosure of Covered Financial Measures. We are concerned that applying the Proposed Instrument to these issuers could cause a significant reduction, in particular, in the willingness of foreign issuers to extend private placement investment opportunities to Canadian investors.

We suggest that the regulatory focus in this area should be on reporting issuer disclosures and, accordingly, we submit that the application of the Proposed Instrument should be limited to reporting issuers.

"Made Available to the Public"

The term "the public" is not defined in Canadian securities law. The concept has been considered in various cases, but can be a difficult one to apply in practice. It may not be clear, for example, that a group of potential Canadian investors, even a small group of highly sophisticated Canadian accredited investors, would not be considered "the public" and therefore non-reporting issuers making a private placement to those investors may be subject to the Proposed Instrument (i) if using an offering memorandum containing Covered Financial Measures, and (ii) thereafter, if they include Covered Financial Measures in a document posted on their website or even, potentially, provided only to that limited group of sophisticated investors who invested in the issuer's securities.

Again, it seems illogical that such issuers would not be subject to Canadian securities rules relating to periodic financial statement disclosure, but would become subject to a Canadian rule relating to the Covered Financial Measures if they chose to disclose such measures, even potentially to a small group of sophisticated investors. Limiting the application of the Proposed Instrument to reporting issuers, as we suggest above, would largely alleviate the above difficulties.

Content of Covered Financial Measures

The Proposed Instrument does not appear, on its face, to limit its scope to Covered Financial Measures relating to an issuer's own financial results. It seems that the Proposed Instrument might apply to Covered Financial Measures of other issuers that an issuer might disclose including, for example, Earnings Before Interest, Taxes, Depreciation and Amortization ("**EBITDA**") of an acquisition target, or EBITDA, Free Cash Flow or a capital management measure of other comparable issuers in a comparison format in an investor presentation. As one may expect, the requirements of the Proposed Instrument may be difficult, if not impossible, for an issuer to comply with in such circumstances. We suggest that the Proposed Instrument should state that it applies to an issuer's own Covered Financial Measures.

With respect to comparative period information, the Proposed Instrument requires presentation of comparative period information for non-GAAP financial measures, however, for segment measures, capital management measures and supplementary financial measures, the Proposed Instrument only requires presentation of comparative period information "if the … measure has been previously disclosed". The reason for such distinction is not immediately apparent to us and we would suggest that the non-GAAP financial measures provision be aligned with the other provisions to limit the requirement to present comparative period information only where such non-GAAP financial measure has been previously disclosed.

Reconciliation of Forward-Looking Non-GAAP Financial Measures

We understand that, in the United States, the rules regarding non-GAAP financial disclosures (known as Regulation G) require a quantitative reconciliation to the most comparable GAAP financial measure "to the extent available without unreasonable efforts, for forward-looking information…". We suggest that the CSA should introduce such a concept to the Proposed Instrument.

Specific Financial Measures Exclusion

The Proposed Instrument, as drafted, would not apply to a specific financial measure disclosed in accordance with a requirement of Canadian securities legislation or the laws of a jurisdiction of Canada. It seems that compliance with the laws of a foreign issuer's home jurisdiction with respect to a disclosed financial measure (or for that matter, compliance by a Canadian issuer required to report such a measure under a foreign law) would not be exempted from application of the Proposed Instrument. We suggest such disclosures should similarly be exempted from the application of the Proposed Instrument.

Required Clarifications

Segment Measures

Section 6 of the Proposed Instrument repeatedly references disclosure of "a total of" segment measures. It is unclear to us what is meant by "a total of" and no guidance is provided in the Proposed Companion Policy. We suggest that the CSA consider whether such references should simply be to "segment measures" rather than "a total of" segment measures. Alternatively, additional clarity should be provided regarding the reference to or meaning of "a total of".

LTM Information

Issuers sometimes disclose financial information for a last twelve months, or "LTM", period, using information from prior historical interim and annual financial statements (for example, a six month period ended June 30, 2018 added to a six month period ended December 31, 2017 (derived from annual financial information for the year ended December 31, 2017, less interim financial information for the six month period ended June 30, 2017) to show results for the LTM period ended June 30, 2018). Although the components of the LTM information may be GAAP measures and derived from two sets of the issuer's financial statements, the aggregated LTM information itself will not be disclosed or presented in any financial statements.

It appears that such LTM information might be a non-GAAP financial measure under the definition in the Proposed Instrument. *Section 1 – Definition of a non-GAAP financial measure* in the Proposed Companion Policy states that "a measure calculated by combining numbers disaggregated from different line items would also meet the definition of a non-GAAP financial measure". It is not clear to us whether this sentence would apply to LTM information that is a combination of GAAP line items (or disaggregations therefrom) from financial statements for two separate periods. It is also not clear to us whether such information would be considered a "disaggregation" of information from the financial statements (rather, it seems like an "aggregation" of amounts taken from financial statements that cover different periods).

It seems to us unusual that such LTM financial information would be considered a non-GAAP financial measure. We suggest that the Proposed Instrument should provide that LTM or other presentations of financial information that are comprised of GAAP or IFRS measures derived from historical financial statements, added together, will not be non-GAAP financial measures; or at least that the CSA should

provide some commentary on this type of information in the Proposed Companion Policy to clarify the status and treatment of such information.

SPECIFIC RESPONSES

1. Does the proposed definition of a non-GAAP financial measure capture (or fail to capture) specific financial measures that should not (or should) be captured? Please explain using concrete examples.

A non-GAAP financial measure is defined in the Proposed Instrument and Proposed Companion Policy to include a financial measure that is not disclosed or presented in the "financial statements" (i.e., either the "primary financial statements" (as defined in the Proposed Instrument) or the notes to the financial statements) and that is not a disaggregation of a line item presented in the "primary financial statements" (i.e., not including the notes to the financial statements). It is not clear to us why the disaggregation concept refers only to a line item in the "primary financial statements", but not an item found in the notes to the financial statements. We submit that the CSA should reconsider this aspect of the definition, or provide guidance that disaggregations of items in financial statement notes will be considered disaggregations of primary financial statement items (if that is the case).

The potential application of the Proposed Instrument to fourth quarter financial information is not entirely clear. The Proposed Companion Policy cites as an example of specific financial measures that are not subject to the Proposed Instrument, the Summary of Quarterly Results prescribed by section 1.5 of Form 51-102F1 – *Management's Discussion and Analysis* ("**Form 51-102F1**") which will include certain fourth quarter information. However, this section only refers to three measures: (i) total revenue, (ii) profit or loss from continuing operations attributable to owners of the parent and (iii) profit or loss attributable to owners of the parent. Some, if not most, issuers disclose much more fourth quarter information, either in narrative discussion of fourth quarter results under section 1.10 of Form 51-102F1 or in a full or partial financial statement-type presentation. We believe such fourth quarter financial information should be a disaggregation of information from the annual financial statements and should not be considered a non-GAAP financial measure. In this regard, we suggest the CSA should specify or clarify:

- Whether (or what type of) fourth quarter financial information is considered to be a disaggregation of financial information presented in the issuer's annual financial statements (and therefore not a non-GAAP financial measure); and

- Whether and how the Proposed Instrument might apply when fourth quarter financial information is published by an issuer before the annual financial statements for the fiscal year are published.

3. Is specific content in the Proposed Companion Policy unclear or inconsistent with the Proposed Instrument?

"Additional Subtotals" and EBITDA

The Proposed Companion Policy in referring to "additional subtotals" required under paragraphs 55 and 85 of IAS 1 – *Presentation of Financial Statements*, provides an example where EBITDA is presented in the "primary financial statements" (but not the notes to the financial statements) "in accordance with the accounting policies used to prepare [the issuer's] financial statements." The Proposed Companion Policy says that such a financial measure "would not meet the definition of a non-GAAP financial measure if it were also disclosed outside the issuer's financial statements".[1]

The example in the Proposed Companion Policy refers to EBITDA presented in the "primary financial statements". We are aware of a number of issuers that may present EBITDA, adjusted EBITDA or other measures or "sub-totals" that do not have prescribed GAAP or IFRS meanings in the financial statements (on a consolidated basis and/or, in particular, for operating segments in the financial statement notes). Issuers often state that these measures are non-GAAP or non-IFRS measures and/or that they do not have a standardized meaning under GAAP or IFRS (indicating that such measures are not standardized GAAP or IFRS measures, although nevertheless shown in the financial statements). These issuers also typically refer to and discuss these measures in corresponding MD&A as non-GAAP or non-IFRS measures.

Is it intended that measures labelled by some issuers as "EBITDA" (or other measures now typically considered non-GAAP measures) will <u>not</u> be considered a non-GAAP financial measure under the Proposed Instrument (if they are able to be presented or disclosed in the financial statements), but measures labelled by other issuers as "EBITDA" <u>will</u> be considered non-GAAP financial measures (if they do not appear in the financial statements and only appear in the issuers' MD&A or another document)? We suggest this will be very confusing and that the CSA should give this further consideration. We request that the CSA provide further clarification in the Proposed Instrument or Proposed Companion Policy in this regard.

Compliance not Feasible

The Proposed Companion Policy[2] seems to recognize there may be circumstances in which compliance with paragraph 3(c) (comparative period presentation of non-GAAP financial measures) of the Proposed Instrument would not be feasible, but states that this would be "only in rare circumstances, such as in the first period of operations where no comparative period exists". However, there is no guidance on what is required of an issuer if it is unable to present a comparative period (for example, would it be necessary to apply for an exemption?). Clarity should be provided in the Proposed Companion Policy. We would also suggest that a "not feasible" or "not applicable" concept be introduced to the Proposed Instrument itself as we expect difficulties with comparative period presentations may arise in the course of an issuer preparing its financial statements and MD&A,

[1] See "Section 1 – Definition of a non-GAAP financial measure", third paragraph.
[2] See "Paragraph 3(c) – Comparative information".

making it unrealistic or impossible to obtain exemptive relief in a short period of time when facing a financial statement filing deadline. This may be the case particularly in the context of issuers making acquisitions of different businesses or operating segments.

Non-GAAP Financial Measures/Ratios that are Financial Outlooks

If a non-GAAP financial measure is both financial outlook and a ratio, the Proposed Companion Policy provides that the issuer may choose to apply the alternate reconciliation requirements either for financial outlook or a ratio. However, the Proposed Instrument itself does not provide an exemption from compliance with both provisions. Such an exemption must be in the Proposed Instrument, not the Proposed Companion Policy.

Section 5(2)(c)(i) of the Proposed Instrument would require presentation of the "equivalent historical non-GAAP financial measure" for exemption from the quantitative reconciliation requirement, but does not allow for a situation where there is no such equivalent. The Proposed Instrument should be amended to introduce a concept of "if applicable", or "…if such equivalent measure has been previously disclosed".

In addition, the Proposed Instrument says, at section 5(2)(c)(ii)(B): "Subparagraph 3(d)(iv) does not apply if, the first time the financial outlook appears in the document, the document describes […] each of the significant components of the financial outlook used in its calculation". However, the Proposed Companion Policy bifurcates the last segment of the above into two distinct alternatives, inconsistent with the Proposed Instrument: "Where a reconciliation for a non-GAAP financial measure that is financial outlook is presented in the format outlined in clause 5(2)(c)(ii)(B) of the Instrument, the reconciliation information provided will be primarily driven by the process followed by the issuer with respect to the preparation, derivation or calculation of the financial outlook, and may include: (a) a description of each of the significant components of the financial outlook, **or** (b) a description of what was used in the calculation of the financial outlook." [emphasis added]. This should be corrected or clarified.

Departures from Existing Guidance in Staff Notice 52-306

We are also of the view that the Proposed Companion Policy should be clearer that it is a departure from the existing guidance in some significant ways, including:

- Financial measures previously not considered to be non-GAAP measures will now be non-GAAP financial measures under the Proposed Instrument. For example, "sales per square foot" was listed in Staff Notice 52-306 – *Non-GAAP Financial Measures* among other performance measures as being "not considered to be non-GAAP financial measures". However, such measure would become a non-GAAP financial measure under the Proposed Instrument (unless the ratio is presented or disclosed in the issuer's financial statements), even if the "sales" amount is the same amount as included as a line item in the issuer's "primary financial statements".

- As a departure from past guidance and changes requested in comment letters from the CSA, the Proposed Companion Policy provides for a new safe harbour for prominence of any discussion and analysis of a non-GAAP financial measure by noting "a location is not more prominent if it allows an investor who reads the document, or other material containing the non-GAAP financial measure, to be able to view the discussion and analysis of both the non-GAAP financial measure and the most directly comparable measure contemporaneously. For example, within the previous, same or next page of the document."

In addition, guidance should also be provided as to how one applies the Proposed Instrument, if at all, to directional disclosures lacking a specific quantitative component (for example, that an acquisition is expected to be accretive to adjusted funds from operations).

4. Is the proposed exemption for SEC foreign issuers appropriate? If not, please explain.

We support the proposed exemption for SEC foreign issuers. We submit that the CSA should reconsider whether the proposed exemption for SEC foreign issuers is too narrow. The appropriateness of applying the Proposed Instrument to designated foreign issuers is not clear to us. As with SEC foreign issuers, NI 71-102 largely defers to a designated foreign issuer's home jurisdiction financial statement and MD&A disclosure requirements. If designated foreign issuers' home jurisdiction requirements for disclosure relating to financial statements and MD&A are felt to be sufficient, and such issuers are accordingly not required to follow the corresponding Canadian requirements, why should they now be made subject to Canadian rules relating to disclosure of Covered Financial Measures (but SEC foreign issuers are not)? We believe this would be very confusing and cumbersome for such issuers.

6. Is the proposed inclusion of all documents to the application appropriate? If not, for which documents should an exclusion be made available? Please explain.

Many issuers use non-GAAP financial measures as goals, targets, criteria or conditions for the purposes of determining executive compensation. Accordingly, as required under Form 51-102F6 – *Statement of Executive Compensation* ("**Form 51-102F6**"), such measures are required to be referred to in compensation discussion and analysis disclosure to fulfill the requirements of Form 51-102F6 to describe and explain the significant elements of compensation paid to Named Executive Officers. Such references to non-GAAP financial measures are not for the purposes of disclosing to investors such measures but rather to fulfill the requirements of Form 51-102F6 relating to executive compensation disclosure. Under the Proposed Instrument, it would appear that all of the requirements of the Proposed Instrument relating to non-GAAP financial measures would apply to references included in executive compensation disclosure pursuant to Form 51-102F6. As the purpose of the disclosure of non-GAAP measures in this context is not to actually disclose the measures but to describe and explain executive compensation in accordance with the requirements of Form 51-102F6, and the non-GAAP financial measures would be subject to the new proposed requirements where they

generally appear (such as MD&A disclosure), applying the Proposed Instrument to such disclosure and requiring compliance with the proposed prominence, reconciliation and all of the related proposed provisions would not serve the purposes of the Proposed Instrument as such disclosure would be provided elsewhere and would significantly detract from executive compensation disclosure.

Additionally, issuers may refer to non-GAAP financial measures when engaging with shareholders, or proxy advisory services, as to executive compensation policies and practices, in accordance with shareholder engagement practices promoted by good corporate governance advocates. Accordingly we would propose that the non-GAAP financial measures provisions of the Proposed Instrument should not apply in respect of executive compensation disclosure and related disclosure.

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If you have any questions concerning these comments, please contact Brendan Reay at 416.863.5273 or brendan.reay@blakes.com, Matthew Merkley at 416.863.3328 or matthew.merkley@blakes.com, or David Bristow at 416.863.5829 or david.bristow@blakes.com.

Sincerely,

(signed) *"Brendan Reay"*

(signed) *"Matthew Merkley"*

(signed) *"David Bristow"*